

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DEFENDANT FACEBOOK, INC.'S
OPPOSITION TO BIRNBAUM & GODKIN,
LLP'S MARCH 18, 2019 MOTION TO SEAL**

Date: July 19, 2019
Time: 2:00 p.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	1
A.	The Court Should Not Seal the Redacted Portions of the Declaration of David S. Godkin in Response to CMO No. 19.	1
B.	The Court Should Not Seal Exhibits A, D, E, and F to the March 5, 2019 Godkin Declaration.	3
C.	The Declaration of [Redacted] and Its Associated Exhibits Are Already Public.	5
III.	CONCLUSION	6

1 **I. INTRODUCTION**

2 This is the second of three sealing motions set for hearing on July 19, 2019. Like Birnbaum &
3 Godkin’s (“B&G”) March 15 sealing motion, the March 18 motion should be denied in substantial part
4 because it seeks to seal information that is already public.

5 *First*, the redacted portions of David Godkin’s March 5 Declaration are revealed by the redacted
6 declaration itself or by exhibits to that declaration, which B&G did not seek to seal when Facebook
7 lodged them on March 6.

8 *Second*, because B&G did not seek to seal the exhibits to the March 5 Godkin Declaration when
9 Facebook lodged them, it cannot do so now. Moreover, Exhibits A and D to that declaration were filed
10 publicly on other dates. Finally, the identity of the consultant associated with Exhibits E and F is
11 similarly public—and his connection to those exhibits easily discerned based on public filings.

12 *Third*, the redacted portions of the declaration of Six4Three’s consultant, and that declaration’s
13 exhibits, were publicly filed in their entirety on March 14, 2019. They remain public to this day and
14 should not be sealed.

15 Notwithstanding these points, Facebook does not oppose sealing the addresses and phone
16 numbers of experts or consultants named in the documents above. In addition, Facebook does not
17 oppose sealing the redacted portions of (1) Exhibits B and C to the Declaration of David S. Godkin in
18 Response to CMO No. 19, or (2) the Supplemental Declaration of David S. Godkin in Response to CMO
19 No. 19. *See* Mot. at 1–2. But the remainder of the portions redacted by B&G should not be sealed for
20 the reasons that follow.

21 **II. ARGUMENT**

22 **A. The Court Should Not Seal the Redacted Portions of the Declaration of David S.**
23 **Godkin in Response to CMO No. 19.**

24 B&G’s March 18 motion asks that the Court seal certain portions of the Declaration of David S.
25 Godkin in Response to CMO No. 19 (“March 5 Decl.”). *See* Mot. at 1. B&G purports to describe these
26 and other redactions as follows: “The information filed under seal here relates to B&G’s methods of
27 handling litigation documents, including the services it used to store the information. The disclosure also
28 identifies and includes personal identifying information of non-testifying consultants and experts who

1 were retained by B&G to assist with the litigation[.]” Mot. at 3:7–10. B&G wants the Court to seal this
2 information because “public disclosure . . . would cause harm to the individuals.” Mot. at 3:11–13.

3 The problem here is that B&G disclosed much of this information or failed to ask that the Court
4 seal it when Facebook lodged the information. For example, B&G claims an interest in the secrecy of its
5 “methods for storage of litigation documents,” Mot. at 2:12–16, but paragraph 7 of Godkin’s “redacted”
6 March 5 declaration notes that “[Redacted] was granted access to *the Relativity document hosting*
7 *platform.*” Decl. of Zachary G.F Abrahamson in Opp’n to B&G’s March 18 Mot. to Seal submitted
8 herewith (“Abrahamson Decl.”) Ex. 1, March 18 Redacted Godkin Decl. at 3:14–15 (emphasis added).¹
9 As for information identifying Six4Three’s experts, paragraph 10 of Godkin’s March 18 Redacted
10 Declaration notes that Godkin is “not able to comply with ¶3 of Case Management Order No. 19
11 directing Six4Three to serve a verified declaration” of an *expert that Godkin proceeds to name.*² *Id.* at
12 4:17–19.

13 Moreover, B&G failed to seal information redacted in the March 18 Godkin Declaration when
14 Facebook lodged that same information on March 6. Specifically, Facebook lodged Godkin’s March 5
15 Declaration—and its associated exhibits—conditionally under seal in connection with Facebook’s Reply
16 in Support of Defendant Facebook, Inc.’s Motion to Open Discovery and to Compel. But when B&G on
17 March 15 moved to seal parts of that declaration, B&G said nothing about the declaration’s exhibits. *See*
18 B&G March 15 Sealing Mot. at 1. Those exhibits reveal the names of each Six4Three expert or
19 consultant who signed the protective order in this action. *See, e.g.,* Abrahamson Reply Decl. in Supp. of
20 Mot. to Open Discovery, Ex. 1 at Ex. B (Mar. 6, 2019). Accordingly, that information cannot now be
21 sealed.³

22
23
24 ¹ In addition, the Court’s March 15, 2019 order on Facebook’s motion to open discovery and to compel
25 publicly quotes that portion of the March 5 Godkin Declaration that states, “[B&G] has stored and
26 maintained Facebook’s confidential information on a password-protected document hosting platform
(Relativity) and on the firm’s secure server.” *See* Abrahamson Decl. Ex. 2, Order re: Mot. to Open Disc.
& to Compel at 9:26–10:4 (Mar. 15, 2019).

27 ² Facebook withholds the name of Six4Three’s retained experts here out of an abundance of caution,
despite the fact that they have been publicly identified by name on multiple occasions.

28 ³ Facebook does not oppose sealing the personal contact information of each expert that Six4Three
retained.

1 **B. The Court Should Not Seal Exhibits A, D, E, and F to the March 5, 2019 Godkin**
2 **Declaration.**

3 In addition to the above portions of the March 5 Declaration itself, B&G asks the Court to seal
4 redactions to the exhibits to that declaration. But as explained above, those exhibits were lodged on
5 March 6 and B&G took no action to seal them. *See* March 15 Sealing Mot. at 1. So B&G cannot now
6 request that the exhibits be kept from public view.

7 Moreover, aside from B&G’s failure to move for a sealing order, Exhibits A, D, E, and F to
8 Godkin’s March 5 Declaration are already public. For example, Exhibit A to Godkin March 5
9 Declaration appears to be the same document filed publicly as Exhibit 1 to the March 14, 2019
10 Declaration of Thomas Scaramellino in Compliance with Amended Case Management Order No. 19
11 (“Scaramellino Decl.”). *Compare* Abrahamson Decl. Ex. 1, March 18 Redacted Decl., Ex. A *with*
12 Abrahamson Decl. Ex. 3, Scaramellino Decl., Ex. 1. Exhibit D to the March 18 Redacted Godkin
13 Declaration appears to be the same document filed publicly as Exhibit 3 to the March 14 Scaramellino
14 Declaration. *Compare* Abrahamson Decl. Ex. 1, March 18 Redacted Godkin Decl., Ex. D; *with*
15 Abrahamson Decl. Ex. 3, Scaramellino Decl., Ex. 3. Accordingly, B&G cannot credibly claim prejudice
16 associated with the publication of these documents. They are public today and should remain so.

17 Exhibits E and F pertain to an expert that Six4Three retained. B&G requests that the Court redact
18 the name and personal details of that expert (Exhibit E) and other documents regarding that expert
19 (Exhibit F). Sealing the redacted portions, B&G maintains, is necessary to “keep the identity and
20 personal identifying information of its consultants and experts under seal[.]” Mot. at 3.

21 But that argument has no force because the identity of Six4Three’s retained experts are already
22 public: In a February 28, 2019 declaration that B&G did not redact, Godkin declared, “[m]y firm
23 retained two expert consultants to assist us with the litigation.” *See* Abrahamson Decl. Ex. 4, Decl. of
24 David S. Godkin in Supp. of Resp. to Def.’s *Ex Parte* Appl. for Order Enforcing Stipulated Protective
25 Order ¶ 2 (Feb. 28, 2019) (“Feb. 28, 2019 Godkin Decl.”). Godkin then publicly named one of those
26 experts, noting that the expert “executed the Certification required by this Court’s Protective Order” and
27 “certified that he had been given a copy of the Protective Order” *Id.* In response to that
28

1 Declaration, this Court issued an order requiring that B&G serve declarations by Six4Three’s experts.
2 *See* Abrahamson Decl. Ex. 5, CMO 19 (Mar. 1, 2019).

3 B&G responded to that order with the March 5 Godkin Declaration, which attached Exhibits E
4 and F. Paragraph 9 of that Declaration publicly described Exhibit E as an “executed certification” by an
5 expert who “confirmed . . . [o]n January 11, 2019” that he deleted Facebook documents. *See*
6 Abrahamson Decl. Ex. 1, March 18 Redacted Godkin Decl. ¶ 9. But that detail effectively identified the
7 declarant behind Exhibit E: After all, just one week earlier, Godkin had declared publicly that “*on*
8 *January 11, 2019*, [a Six4Three expert] *confirmed* that he had deleted all of Facebook’s documents.”
9 *See* Abrahamson Decl. Ex. 4, Feb. 28, 2019 Godkin Decl. ¶ 3 (emphasis added). Accordingly, Exhibit E
10 redacts nothing the public does not already know and should not be sealed.⁴

11 Finally, B&G has not shown good cause to seal the entirety of Exhibit F. Again, B&G offers no
12 reason to seal Exhibit F beyond the throwaway argument that the disclosure “identifies and includes
13 personal identifying information of non-testifying consultants.” Mot. at 3. But here—as with other
14 information that B&G’s motion seeks to seal—the vast majority of Exhibit F is already public. In
15 particular, the March 20, 2019 “Declaration of [Redacted]”—file-stamped March 25, 2019 on the Court’s
16 public docket—published most of the information in Exhibit F, which B&G redacted in its entirety when
17 lodged on March 18. *See* Abrahamson Decl. Ex. 6, Decl. of [Redacted] (Mar. 25, 2019) (“March 20
18 Decl.”).

19 Moreover, the unredacted portions of that March 20 Declaration *effectively* unsealed what little
20 information was not published outright. For example, the March 20 Declaration continues to redact
21 certain names and identifying information related to the declarant. *Id.* But the declaration also states that
22 the declarant executed a protective order certification in May 2018 and received protected material in
23 May and June 2018. *See* Abrahamson Decl. Ex. 6, March 20 Declaration ¶¶ 3–4. The declarant
24 continues, “I destroyed all Facebook confidential and highly confidential information in my custody or
25 control between January 4, 2019 and January 11, 2019.” *Id.* at ¶ 6. These statements, when read with
26

27
28 ⁴ The only exception to this statement is the address and phone number of the expert that signed Exhibit E. Facebook does not oppose sealing the expert’s address and phone number.

1 Godkin’s public February 28, 2019 Declaration, must refer to the same expert named by Godkin’s
2 February 28 declaration. *See* Abrahamson Decl. Ex. 4, Feb. 28, 2019 Godkin Decl. ¶ 3.

3 The public exhibits to the March 20 Declaration confirm this inference. Those exhibits mention a
4 client who “is a well-known privacy and data rights activist.” Abrahamson Decl. Ex. 6, March 20 Decl.
5 at Ex. 002, *and compare with* Abrahamson Decl. Ex. 4, Feb. 28, 2019 Godkin Decl. ¶ 2 (“[The named
6 expert] is a well-known expert in digital privacy issues”). Similarly, the redacted declaration speaks of a
7 client who “destroyed all Facebook confidential and highly confidential information in his custody . . .
8 between 4 January 2019 and 11 January 2019.” Abrahamson Decl. Ex. 6, March 20 Decl. at Ex. 003,
9 *and compare with* Abrahamson Decl. Ex. 4, Feb. 28, 2019 Godkin Decl. ¶ 3 (“[O]n January 11, 2019,
10 [the named expert] confirmed that he had deleted all of Facebook’s documents.”). An unredacted
11 reference to commentary on this litigation includes a citation to the expert’s Twitter account.
12 Abrahamson Decl. Ex. 6, March 20 Decl. at Ex. 034. And public portions of the March 5 Godkin
13 Declaration suggest that the name of the expert’s lawyer is Ravi Naik, *see* Abrahamson Decl. Ex. 1,
14 March 18 Redacted Godkin Decl. ¶ 10 (“Later in the day . . . , I received an email from Mr. Ravi
15 Naik[.]”)—the author of the correspondence attached as exhibits to the March 20 Declaration. These are
16 easy dots to connect. There is no reason to keep Exhibit F under seal.

17 **C. The Declaration of [Redacted] and Its Associated Exhibits Are Already Public.**

18 Next, B&G asks that the Court seal “[t]he redacted portions of the Declaration of [Redacted]” and
19 exhibits attached to that declaration. Mot. at 1. But the public contents of that “Declaration of
20 [Redacted]” show that it is a declaration that was filed unredacted in its entirety on March 14, 2019. That
21 declaration is accessible in its entirety on the public docket, associated with a March 14, 2019 docket
22 entry. In addition, the public docket in this case reveals the declarant behind the “Declaration of
23 [Redacted]” lodged by Birnbaum & Godkin on March 18. This information, and the entirely unredacted
24 March 14 declaration, have been public for three months now. The declarant has not filed complaints of
25 resulting “harm,” and Facebook is aware of none.

26 Moreover, even if the declarant’s name was not already on the public docket—as noted above, it
27 is—the parties discussed the declarant by name in open court. *See, e.g.,* Abrahamson Decl. Ex. 7, Hr’g
28 Tr. at 37:5–11 (Mar. 13, 2019). Indeed, Facebook noted on the record that the declarant “went to college

1 with Mr. Scaramellino. Apparently Mr. Scaramellino engaged him in this matter. He runs a hedge
2 fund.” *Id.* In light of that on-the-record discussion, B&G’s claim—that the declarant would suffer harm
3 from unsealing—is baseless.

4 **III. CONCLUSION**

5 For the foregoing reasons, B&G’s March 18 sealing motion should be DENIED, except insofar as
6 that motion seeks to seal (1) Exhibits B and C to the Declaration of David S. Godkin in Response to
7 CMO No. 19, (2) the Supplemental Declaration of David S. Godkin in Response to CMO No. 19, and (3)
8 the address and phone number of the expert that signed Exhibit E to the Declaration of David S. Godkin
9 in Response to CMO No. 19.

10
11 Dated: July 8, 2019

DURIE TANGRI LLP

12
13 By: _____



SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

ZACHARY G. F. ABRAHAMSON

16 Attorneys for Defendants
17 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
18 Javier Olivan, Samuel Lessin, Michael Vernal, and
19 Ilya Sukhar

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On July 8, 2019, I served the following documents in the manner described below:

6 **DEFENDANT FACEBOOK, INC.'S OPPOSITION TO BIRNBAUM & GODKIN,
7 LLP'S MARCH 18, 2019 MOTION TO SEAL**

8 ☒ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business
9 practice of Durie Tangri LLP for collection and processing of correspondence for overnight
10 delivery, and I caused such document(s) described herein to be deposited for delivery to a
11 facility regularly maintained by Federal Express for overnight delivery.

12 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
13 Durie Tangri's electronic mail system from cortega@durietangri.com to the email
14 addresses

15 On the following part(ies) in this action:

16 **VIA OVERNIGHT MAIL & EMAIL**

17 Reno F.R. Fernandez III
18 Matthew J. Olson
19 Macdonald Fernandez LLP
20 221 Sansome Street, Third Floor
21 San Francisco, CA 94104
22 Reno@MacFern.com
23 Matt@MacFern.com

24 *Attorneys for Plaintiff Six4Three, LLC*

25 **VIA EMAIL ONLY**

26 Stuart G. Gross
27 GROSS & KLEIN LLP
28 The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

VIA EMAIL ONLY

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

VIA EMAIL ONLY

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

VIA EMAIL ONLY

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 **VIA EMAIL ONLY**

2 Donald P. Sullivan
3 Wilson Elser
4 525 Market Street, 17th Floor
5 San Francisco, CA 94105
6 donald.sullivan@wilsonelser.com
7 Joyce.Vialpando@wilsonelser.com
8 Dea.Palumbo@wilsonelser.com

9 *Attorney for Gross & Klein LLP*

10 I declare under penalty of perjury under the laws of the United States of America that the
11 foregoing is true and correct. Executed on July 8, 2019, at San Francisco, California.
12

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Christina Ortega